Bills, particularly since they had not challenged or protested against their validity.

The defendants refuted the claim and said that they were merely agents for collecting the Bills for the plaintiff and under the Act, were entitled to have recourse to the latter in the event of their being dishonoured. They did make advances to the plaintiff but at the plaintiff's specific request and instruction. They said there was nothing to prevent them from being the holder for value and the collector at the same time, whereby they were not bound to lodge a protest under the Act. They also said that the plaintiff by their conduct had, even if the defendants had acted wrongly, waived it.

It seems clear that whether the defendants were holders for value or merely a collector or whether they can be both a holder in due course and a collector are arguable and can only be fully and fairly resolved at a trial. The defendants said they were essentially collectors of the Bills. The plaintiff said the defendants were holder in due course and for value. The Bills have, however, clearly not been accepted by the drawee because they had not signed them which is one of the conditions for their enforceability. (Section 17 of the Bills of Exchange Act). The evidence seems to support quite strongly the case for the defendants being collectors because in the instruction given by the plaintiff to the defendants, called the letter of instructions on outward documentary Bill, it was clearly provided

"Against the above Collection, please advance us % of the draft amount and pay us the balance after collection. In case of non-acceptance or non-payment of the draft, we shall refund you the advanced amount together with interest at % p.a. immediately upon receipt of your advice .....
It is understood and agreed that having exercised due care in the selection of any correspondent to whom the above mentioned item may be sent for collection you shall not be responsible for any act, omission, default, suspension, insolvency or bankruptcy of any such correspondent or sub-agent thereof, or for any delay in remittance, loss in exchange or loss of item or its proceeds during transmission or in the course of collection, until such time as actual payment shall have come into your possession. We engage to reimburse you for any advances made in anticipation of collection as well as disbursements made in effort to effect the same."

These terms clearly provide that the plaintiff was to refund the advance in case of non-acceptance or non-payment of the Bill. The defendants were not responsible as collectors for any act until actual payment was made to them and the plaintiff was to reimburse the defendants for any advance made if it had been frustrated. These terms are clearly inconsistent with the allegation that the defendants were merely holders in due course of the Bills. Indeed, they quite unequivocally refer to the position of the defendants as the collector, and therefore they would not be liable on the Bills unless they are met.

I would, in the circumstances, therefore dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Chew Biman & Co.; Yeo & Yeo.*

CHANG LEE SWEE v. PUBLIC PROSECUTOR

[A. Cr. J. (Gunn Chit Tuan J.) March 15, April 3 to 6, April 21, 1984]

[Kuala Lumpur – Criminal Appeal No. 51 of 1982]

Criminal Law and Procedure – Criminal breach of trust by agent – Entrustment – Dishonest intention – Failure to consider defence evidence – Penal Code, s.409.

The appellant was charged for the offence of criminal breach of trust by an agent under section 409 of the Penal Code. The prosecution alleged that the appellant being an agent, namely the Executive Director of Finance of Trengganu Development and Management Berhad (TDMB) and in such capacity entrusted with the funds of the said company committed breach of trust by transfering the funds amounting to $390,000.00 to another company called Klang Jaya Baru Development Berhad (KJDB) without the approval of the Board of Directors. The appellant was convicted and sentenced to imprisonment for three years by the Sessions Court at Kuala Lumpur.

The appellant appealed. It was contended (a) that the learned President erred in law and in fact in holding that the prosecution had at the close of the case for the prosecution discharged the burden of proof upon it and that the learned President was wrong in holding that the appellant was entrusted with the funds of the TDMB: (b) that the learned President erred in holding that the appellant had acted dishonestly in authorising the four payments forming the subject-matter of the charge (c) that the learned President had failed to consider all the evidence that was before him and had also failed to consider fully the defence case.

Held: (1) if both the documentary and oral evidence in the case had been carefully considered, the learned President would have come to the conclusion that the appellant, even after he was appointed an executive director in charge of financial affairs, was not in a position to manage the

funds of TDMB without the overall control of Tan Hooi Bing who was the managing director of TDMB and the appellant was therefore in the circumstances of this case not entrusted with or had complete dominion over its funds;

(2) in this case a simple question should have been asked and that was whether one would have dishonest intention if the so-called withdrawals or transfers of funds were properly accounted for and recorded in the books of accounts of the companies concerned. If the learned President had asked the question and considered all the evidence adduced, both oral and documentary, in this case she could have come to the conclusion that there was no dishonest intention on the part of the appellant to cause wrongful loss to TDMB or wrongful gain to KJDB and should not have called for the defence;

(3) in this case the appeal court was satisfied that not only was there no *prima facie* case proved against the appellant but also that the evidence adduced by the defence had created a reasonable doubt whether or not the appellant had committed the offence of criminal breach of trust by an agent as alleged by the prosecution;

(4) the conviction should be set aside not only because it was against the weight of the evidence but also because the learned President had failed to consider all the evidence that was before her and in that sense had failed to consider fully the defence evidence.

Cases referred to:–

(1) *Lake* v. *Simmons* [1927] A.C. 487; 96 L.J.K.B. 621.
(2) *Indra Narayan* v. *The State* A.I.R. 1963 Cal. 64.
(3) *Re Lands Allotment Co.* [1894] 1 Ch. 616.
(4) *Shivanarayan* v. *State of Maharashtra* A.I.R. 1980 S.C. 439, 440.
(5) *Selangor United Rubber Estates Ltd.* v. *Cradock* [1968] 2 All E.R. 1073.
(6) *Hotel Jayapuri Bhd* v. *National Union of Hotel Bar and Restaurant Workers* [1980] 1 M.L.J. 109.
(7) *Navaratnam* v. *Public Prosecutor* [1973] 1 M.L.J. 154.
(8) *Harakrishna Mahatab* v. *Emperor* A.I.R. 1930 Patna 209.
(9) *Mohamed Shariff* v. *Public Prosecutor* [1964] M.L.J. 64.

CRIMINAL APPEAL.

G. Sri Ram (*Raja Abdul Aziz Addruse* with him) for the appellant.

Nik Abdul Rahman bin Nik Mat (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Gunn Chit Tuan J: The appellant was charged for the offence of criminal breach of trust by an agent on March 12, 1981, and the charge against him was as follows:–

"That you between 29.9.1976 and 28.7.1977 at the office of Trengganu Development and Management Berhad, 1st Floor Sim Lim Building, No. 57, Jalan Brickfields, in the Federal Territory, Kuala Lumpur, being an agent, namely the Executive Director of Finance of Trengganu Development and Management Berhad and in such capacity entrusted with certain property, to wit, the funds of the said company, committed criminal breach of trust in respect of the said funds amounting to $390,000/- and that you have thereby committed an offence punishable under Section 409 of the Penal Code."

He claimed trial to the said charge and was on April 10, 1982, convicted thereon and sentenced to imprisonment for three years by the Sessions Court at Kuala Lumpur after a trial of twenty-four days spread over a period of eight months. In order to understand the case for the prosecution and the appellant's defence it would be useful to set out here briefly the background facts of the case.

Background Facts:

The offence of criminal breach of trust by an agent was alleged to have been committed by the appellant by what was called 'transfers of fund' amounting to $390,000/- from a company called Trengganu Development and Management Berhad (TDMB) to another company called Klang Jaya Baru Development Berhad (KJDB). TDMB was incorporated on December 1, 1965, as a result of an agreement between the Trengganu State Economic Development Corporation and a company called National Development and Finance Corporation Limited (NADEFINCO Limited). According to the said agreement (exhibit D.72) about 33,500 acres of State land were leased to NADEFINCO Limited for forty-six years subject to a further renewal of another forty-six years. It was also agreed that NADEFINCO Limited do at its own cost and expense "clear, develop and plant the said lands with oil palms" and also to incorporate a subsidiary management company, that is TDMB, to manage, maintain and upkeep the planted land as well as for harvesting, processing, marketing and sale of the oil palm produce from the said lands. The said obligations on the part of NADEFINCO Limited would also bind its subsidiary companies.

By that agreement (exhibit D.72) as well as the memorandum and articles of TDMB (exhibit P.12) NADEFINCO Limited was to have majority representation on TDMB's board of directors. Initially the financing of TDMB was arranged by NADEFINCO Limited but due to the Malayani-

zation policy of Government, it became difficult for the financing to be left to NADEFINCO Limited whose directors were in Singapore. To get over that difficulty another company was incorporated in Malaysia on April 7, 1973, by the name of NADEFINCO Holdings Berhad (NADEFINCO Holdings). NADEFINCO Holdings has since its incorporation been controlled by NADEFINCO Limited through the latter's control of the former's board of directors. NADEFINCO Holdings also controlled the board of directors of KJDB through a majority in the number of directors and eventually NADEFINCO Limited has six subsidiary companies namely, Cindee Development Sendirian Berhad, Syarikat Perlombongan Trengganu Selatan Sendirian Berhad, Malaysia Land Investment Company, Sim Thye Development Limited, TDMB and KJDB.

The prosecution's case as found by the Sessions Court.

The learned president found that during the relevant period, that is, between September 29, 1976, and July 28, 1977, the appellant was an executive director of TDMB in-charge of financial matters of that company. He was first appointed an executive director of TDMB in 1976 (exhibit P.14A) and was responsible for the financial matters of the company, although he was not given specific powers by the board of directors. On November 1, 1976 the appellant also became a director of KJDB which had no shares in TDMB and vice-versa; but NADEFINCO Holdings of which the appellant was also one of the directors held 41% shares in TDMB and 46% in KJDB.

Sometime in early 1978 it was suspected that the funds of TDMB were being used for other companies and according to the chairman of TDMB (P.W.4) neither he nor the board was aware of four transactions (exhibits P.1A, P. 16, P. 17 and P.18) by which a sum totalling $390,000/- was transferred to KJDB. According to P.W.4 there were no resolutions for those four transactions nor were there any resolutions for the transfer of funds from other companies to TDMB and vice-versa. That witness maintained that the appellant was not given any powers to transfer or lend any money to companies which had no connection with TDMB. With those brief facts of the case for the prosecution as found by her, the learned president for the reasons stated in her judgment held that a *prima facie* case had been made out and called for the defence.

The appellant's grounds of appeal.

(a) *Entrustment.*

It was therefore to be expected that two of the appellant's grounds of appeals were that "the learned President erred in law and fact in holding that the prosecution had, at the close of its case discharged the burden of proof cast upon it" and "was wrong in holding that the Petitioner was entrusted with the funds of TDMB." The learned president was aware of the ingredients of the offence under section 409 of the Penal Code which the prosecution had to prove. There was evidence (exhibit P.14A), and it was not disputed, that the appellant was an agent of TDMB. On entrustment she was aware that the word "entrusted" is not necessarily a term of law and that in its general significance, all it imports is a handing over the possession for some purpose which may not imply the conferring of any proprietary right at all (per Viscount Haldane in *Lake* v. *Simmons*[1]). But she seemed, and this was conceded by the learned deputy, to have made her finding that there was entrustment merely on the evidence of the chairman of TDMB (P.W.4) who said that once the appellant was appointed as an executive director in-charge of finance, he was entrusted with the funds of TDMB. That witness also said that although the appellant was responsible for the financial matters of TDMB, he was not given specific powers by the board to lend money to other companies. On that evidence the learned president stated that she was satisfied that the ingredient regarding entrustment had been proved. Counsel for the appellant contended that the learned president had abdicated her function in regard to interpretation and construction of legal documents produced in this case and only relied on the oral evidence of witnesses. He pointed out that she had completely ignored and disregarded the directors' resolution appointing one Tan Hooi Bing (hereinafter referred to as "Tan") as the managing director of TDMB. (exhibit P.13A). Counsel opined that that was the single most important document in the whole case which required construction as to its purport. In that resolution it was resolved by the board of directors on April 3, 1971, that Tan be appointed managing director of the company subject to the following terms and conditions namely,

"(i) He shall hold office as Managing Director of the Company until otherwise determined by the Board, or until he shall resign office as Managing Director, or shall

cease to hold the office by virtue of Article 107 of the Company's Articles of Association.

(ii) He shall comply with and conform to any instructions or directions from time to time given by the Board of Directors, but subject thereto shall undertake the general management of the Company's business and affairs and shall have and may exercise all or any of the powers and discretions conferred upon the Board of Directors by the Company's Articles of Association other than the power to borrow and make calls on behalf of the Company. Provided that before deciding upon or giving instructions or directions relating to any matter of major importance in connection with the general policy or operations of the Company in relation to which no instructions or directions have been given by the Board of Directors, the Managing Director shall, whenever practicable, refer such matter to a meeting of the Board and act in accordance with any decision of the Board, but his omission so to do shall not invalidate any decision or any action taken by him."

Counsel therefore submitted that if the above-quoted directors' resolution in exhibit P.13A had been considered properly by the Sessions Court, its purpose and effect would be clear. He also referred to the following articles of association of TDMB (exhibit P.12) and contended that they too should have been considered by that Court:—

"92. The business of the company shall be managed by the directors, who may exercise all such powers of the company as are not, by the provisions of the Act or by these present, required to be exercised by the company in a general meeting, and the exercise of the said powers shall be subject also to the control and regulation of any general meeting of the company but no resolution of the Company in a general meeting shall invalidate any prior act of the directors which would have been valid if such resolution had not been passed. Provided always that the directors shall not sell or dispose of the undertaking of the company without the resolution of a general meeting."

"96. The Directors may from time to time appoint one or more of their body to the office of managing director or manager for a term not exceeding five years upon such terms and at such remuneration whether by way of salary, or commission, or participation in profits, or partly in one way, and partly in another, as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation, or taken into account in determining the rotation of retirement of directors; but his appointment shall be subject to determination *ipso facto* if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined."

"98. The Directors may entrust to and confer upon the Managing Director any of the powers exercisable by them upon such terms and conditions as they think fit and either collaterally with or to the exclusion of their own powers, and may from time to time revoke, withdraw, alter or vary all or any of such powers."

It was the contention of counsel that the said directors' resolution appointing Tan as managing director considered in the light of the above-quoted articles of association meant that the board of TDMB had delegated all its powers, except the power to borrow and to make calls, to Tan, the managing director.

It was also pointed out by counsel that the learned president, in finding that the ingredient of entrustment has been proved, had not considered the evidence of one of the prosecution witnesses called Chung Shui Tett (P.W.9), who was a very senior legal practitioner. That prosecution witness told the Court that the said resolution (exhibit P.13A) of which he was one of the signatories gave the managing director of TDMB extensive powers, with the exception of the powers to borrow and make calls. Under the powers given by that resolution, the managing director did not have to refer any transaction which he has undertaken involving the lending of a large amount of money. Although such transaction was of major importance, it was not imperative that he has to refer the matter to the board. It was up to his discretion and if he considered it impracticable to refer to the board before deciding or taking action in any matter, he need not refer to the board even if it was a matter of major importance. That same witness was also referred to the above-quoted articles of association and agreed that the board of directors could under article 98 entrust all the powers to the managing director except the powers which are exercisable by the directors in a general meeting.

Counsel then referred to the Indian case of *Indra Narayan* v. *The State*[2] in which it was held that the director of a company is a trustee in respect of those funds of the company which are under his control. Where the control over the funds of a company is vested in the board of directors, but in fact it is the chairman of the board of directors who exercises effective control over the funds, in such a case, it is the chairman and not the board of directors, who will be in the position of a trustee, and if he deals with the funds in a manner which is beyond his powers, he will be guilty of the offence of criminal breach of trust. The Indian Court in that case relied on *Re Lands Allotment Co.*[3] where Lindley J. said: "Although directors are not properly speaking trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control; and ever since joint stock companies were invented directors have been held liable to make good moneys which they have mis-

applied upon the same footing as if they were trustees . . . . . ." Counsel then pointed out that the appellant was subordinate to the managing director and was subject to his instructions. If he acted according to any directions of the managing director, he could not be said to have had the power to act independently. Counsel also pointed that the appointment of the appellant as an executive director in-charge of financial affairs did not contain any mention of control over funds being taken away from the managing director. It was therefore the contention of counsel that if there were any doubt on the construction of the effect of the directors' resolutions appointing the managing director as well as the appellant, then they should be resolved in favour of the appellant. In short it was the contention of appellant's counsel that if the learned president had not relied merely on the assertion of the chairman (P.W.4) but had considered or appreciated the effect of the directors' resolutions as well as the oral evidence of the other prosecution witnesses she would not have erred in holding that the appellant was entrusted with the funds of TDMB.

The contention of the learned deputy was that although the President of the Sessions Court seemed to have relied on the evidence of P.W.4 only, her finding of entrustment was arrived at in the context of the directors' resolution of August 12, 1976, appointing the appellant "an executive director of the company to look after its financial affairs as from April 1, 1976, and that he be paid a salary of $1,000/- per month effective from that date" (exh. P14A). He pointed out that it was the appellant who had authorised the four transfers in question (exhibits P.16, 17, 18 and 1A) and was also one of the signatories of the cheques issued in respect of those payments (exhibits P.16B, 17B, 18B and P.1C). The learned deputy contended further that the failure of the President of the Sessions Court to consider exhibit P.13A when she decided on the issue of entrustment was not fatal as the powers of the appellant and the managing director were, he submitted, co-existing. He also contended that although the managing director had the overall general power of management of the company by virtue of exhibit P.13A, the appellant had the power of looking after its financial affairs which would necessarily entail the dominion and control over its funds. He then referred to the Indian case of *Shivanarayan* v. *State of Maharashtra*[4] in which it was held that a director is not only an agent but is in the position of trustee. A director being a trustee of the assets which has come into his hands, has dominion and control over the same. In that case the property in question, being an actionable claim against one Gopaldas, was entrusted to the managing director with complete dominion over the right to recover the same under the articles of the company and as such it was held that he was capable of commiting dishonest misappropriation or conversion of that actionable claim, and a finding of the trial judge on the point of entrustment was upheld and confirmed. The prosecution's contention on this issue was therefore that exhibit P.13A appointing Tan the managing director did not preclude the appellant from having control and management over the funds of TDMB.

Directors of companies are trustees of the powers committed to them, as for instance, the power of approving transfer of shares, of allotting shares, of employing the funds of the company, of making calls or receiving payment in advance of calls, or forfeiting shares, and as trustees they may be rendered liable for their misuse (See *Buckley* on the Companies Acts and cases collected there). On the question of whether directors are trustees of the funds of their companies, it will be appropriate here to refer to the following dictum of Ungoed Thomas J. in the recent English case of *Selangor United Rubber Estates Limited* v. *Cradock (No. 3)*[5].

"The first question of law that arises is how far directors are trustees of their companies' funds .....

On occasion directors have been said to be trustees and on occasion not to be trustees. Like so many interminable arguments in philosophy, economics and everyday life, its resolution depends largely upon definition of terms, in this case of 'trustees' and then on the ambit of its proper application to directors.

Directors are clearly not trustees identically with trustees of a will or marriage settlement. In particular, so far as at present relevant, they have business to conduct and business functions to perform in a business manner, which are not normally at any rate associated with trustees of a will or marriage settlement. All their duties, powers and functions qua directors are fiduciary for and on behalf of the company. So property in their hands or under their control is theirs for the company, i.e. for the company's purposes in accordance with their duties, powers and functions. However much the company's purposes and the directors' duties, powers and functions may differ from the purposes of a strict settlement and the duties, powers and functions of its trustees, the directors and such trustees have this indisputably in common – that the property in their hands or under their control must be applied for the specified purposes of the company or the settlement; and to apply it otherwise is to misapply it in breach of the

obligation to apply it to those purposes for the company or the settlement beneficiaries. So, even though the scope and operation of such obligation differs in the case of directors and strict settlement trustees, the nature of the obligation with regard to property in their hands or under their control is identical, namely, to apply it to specified purposes for others beneficially. This is to hold it on trust for the company or the settlement beneficiaries as the case may be. That is what holding it on trust means. That is why a misapplication of it is equally in each case a breach of trust. This is just not treating as a breach of trust something which is not a breach of trust. No ground has been suggested for treating it as a breach of trust except that it is a breach of trust .....

.....

.....

So, in my view, in general as in this case, a credit in a company's bank account which the directors are authorised to operate are moneys of the company under the control of those directors and are held by them on trust for the company in accordance with its purposes ....."

However the issue of whether there was entrustment in this case was, in my opinion, not free from difficulties. In my judgment when TDMB was incorporated and the directors appointed to its board in 1965 the board of directors must be considered to have been entrusted with the powers as well as the funds of the company. But the question which the court in this case had to and should have considered was the effect of the directors' resolution appointing Tan the managing director of TDMB on April 3, 1971. It was clear from the said resolution that the board of directors had in 1971 given to Tan all the powers and discretions conferred upon the board of directors by the company's articles of association other than the power to borrow and make calls on behalf of it. It would therefore appear from that resolution considered together with the articles of association that the board of TDMB had delegated and entrusted to Tan all its powers except the power to borrow and make calls, but including the power to manage the funds of the company. The court should have also considered the evidence of the other prosecution witness (P.W.9) who gave evidence regarding the extensive powers given to Tan. If both the documentary and oral evidence in this case had been carefully considered, the learned president would have come to the conclusion that the appellant, even after he was appointed an executive director in-charge of financial affairs five years after Tan, that is in the year 1976, was not in the position to manage the funds of TDMB without the overall control of Tan and was therefore in the circumstances of this case not entrusted with or had complete dominion over its funds. I also agreed with the learned counsel for the appellant that even if there were any doubts on the construction of the directors' resolutions (exhibits P13A and P14A) such doubts in their construction should have been resolved in favour of the appellant.

(b) *Dishonest intention*

The other important grounds of appeal were that "the learned president erred in not having directed her mind to or considered adequately the issues involved for determining whether the petitioner had in fact or in law committed an act of misappropriation" and "was wrong in holding that petitioner had acted dishonestly in authorising the four payments forming the subject matter of the charge." The learned president found that there was evidence adduced by the prosecution to show that a total sum of $390,000/- had been "withdrawn" from the account of TDMB. (exhibits P.1D, P.16C, P.17C, P.18E) by means of four cheques (exhibits P.1A, P.16B, P.17B, P.18B). She was satisfied that there was dishonest intention on the part of the appellant because those so-called withdrawals or transfers were made without the approval of the board of TDMB and that they were never referred to the board. Because the appellant was also a director of NADEFINCO Holdings, which held 46% of the capital of KJDB, she found that the appellant was therefore indirectly through his 10% share in NADEFINCO Holdings, holding 4.6% shares of KJDB and that he therefore stood to gain from those transfers of funds. Finally the learned president considered that although there was no real loss in the present case because the four transfers to KJDB were subsequently assumed by NADEFINCO Holdings yet she held that there was misappropriation because the appellant had no authority to transfer the funds and had caused TDMB to suffer wrongful loss.

Counsel for the appellant submitted that the president had misdirected herself for various reasons. First, because the transactions involving the four payments from the account of TDMB to the account of KJDB should be considered and examined in the context of all the surrounding circumstances bearing in mind the relevant previous conduct and practices of that company. Counsel said that it was an over-simplication and unrealistic for the president to have considered that TDMB and KJDB had no connection because both companies are within the NADEFINCO group. He pointed out that in company law, the Court will, in the interest of justice, lift the veil

of incorporation and treat a group of companies as a single entity though *stricto sensu* they are separate legal entities. (*Hotel Jayapuri Bhd.* v. *National Union of Hotel, Bar and Restaurant Workers.*[6]). Counsel then referred to the evidence of a prosecution witness Chang Ming Huang (P.W.7), who was also a director of TDMB, and to various extracts in the ledger of TDMB (exhibit D.48). That witness said that transfers of funds by the companies within the NADEFINCO group had been going on for a long time. Counsel also referred to the evidence of another prosecution witness Ho Hee Fong (P.W.11), an accountant of KJDB, who confirmed that money had been lent to his company by TDMB in the past, and the fact of similar payments even before the appellant became a director was also acknowledged by the investigating officer (P.W.14) and the director Chang Ming Huang (P.W.7) also confirmed that all those previous transfers by the companies in the NADEFINCO group were on the instructions of the common managing director Tan who was at the relevant time the managing director of TDMB and KJDB. Even P.W.7 himself had been authorised to make similar transfers on the instructions of Tan. Counsel pointed out that the four payments authorised by the appellant were in no way different from the other "transfers of funds" or "payments of account" authorised by P.W.7. In fact according to the evidence of P.W.11, Tan who was the managing director of both TDMB and KJDB, was informed of the financial position of KJDB immediately before each of the four payments concerned were made to it from TDMB. Counsel contended that the transfers forming the subject matter of the charge looked at in the context of the entries in the account books were nothing more than advances by TDMB to KJDB and that the learned president had misdirected herself when she held that those payments were withdrawals from the funds of TDMB.

The practice of charging interest of 1% per month for borrowings by companies within the NADEFINCO group was also referred to by counsel for the appellant. He referred to the evidence of another prosecution witness Tan Kim Chew (P.W.10), the accounts clerk and bookkeeper of TDMB, as well as to the evidence of the said Ho Hee Fong (P.W.11), the accountant of KJDB, both of whom told the court that in fact interest of 1% per month was charged by TDMB and paid to it by KJDB for the four sums advanced to it. Proper accounts were also kept of all transfers of funds including the four payments in question and even the chairman of TDMB himself (P.W.4) confirmed that the accounts of all the companies in the NADEFINCO Group were audited annually and the auditors' reports including those of TDMB were tabled before the various boards. Those reports would have been considered by the directors before they were taken into the annual general meetings for approval.

As regards the learned president's finding that the appellant stood to gain wrongfully, counsel submitted that there had been a serious misdirection because the absurdity of the reasoning in terms of dollars and cents was obvious bearing in mind that KJDB had to pay TDMB interest at the rate of 1% per month on the $390,000/-. Counsel said that although the learned president found that the appellant was indirectly holding through his 10% share in NADEFINCO Holdings 4.6% shares of KJDB, she had ignored the fact that the appellant's 10% shareholding in NADEFINCO Holdings would equally entitle him to 4.1% indirect interest in TDMB, even disregarding his direct shareholdings therein. In short, counsel for the appellant contended that the learned president never dealt with any of the above issues in her judgment and on that ground alone the president had misdirected herself on the facts and her findings could not be supported by the evidence. He submitted that as the four payments in question were no more than advances or loans in the ordinary course of commercial dealings between TDMB and KJDB which were companies in the NADEFINCO Group and that there were similar dealings involving TDMB and the other companies of that Group since 1973 even before the appellant was appointed a director must negative any dishonest intention on his part and the defence should not have been called.

The learned deputy in reply referred to the following passage on the lifting of the corporate veil in *Professor Gower's* Modern Company Law (4th. Edition) at Page 138:-

> ". . . . . those who have chosen the benefits of incorporation must bear the corresponding burdens, so that if the veil is to be lifted at all that should only be done in the interests of third parties who would otherwise suffer as a result of that choice . . . . . The most that can be said is that the court's policy is to lift the veil if they think that justice demands it and they are not constrained by contrary binding authority".

He contended that TDMB and KJDB were not

connected except for a common managing director and some common directors though it was claimed that they are companies in the same group. In any case the transfers of funds were not, he submitted, by any stretch of imagination in the interests of third parties, for example creditors of TDMB, so as to entitle the court to lift the veil. He contended that TDMB and KJDB were entirely separate entities with different shareholders and justice did not demand the lifting of the corporate veil and to treat them as subsidiary companies of one entity. As regards the previous practice of the transfers of funds among companies within the NADEFINCO Group, he stated that the appellant was not authorised by Tan to effect the four transfers in question, and contended that the appellant was attempting to put the blame on Tan merely to exculpate himself and that although Tan might be aware of those transfers it did not absolve the appellant of criminal liability. He also contended that there was no reason why the board of directors should not have been informed by the appellant himself although it was the duty of Tan as managing director to have done so. In effect it was his contention that the appellant had intended to cause wrongful loss to TDMB and wrongful gain to KJDB thus making the transfers dishonest within the meaning of section 405 of the Penal Code and that there was therefore a *prima facie* case against him.

I did not think that the facts of this case would justify the court in lifting the corporate veil because the evidence did not show that the two companies, especially TDMB, were wholly-owned subsidiaries of or that 90% of their shares were held by either NADEFINCO Limited or NADEFINCO Holdings. But in view of the evidence adduced in this case the learned president should have considered the following provisions of section 5(1)(a) and 6(c) of the Companies Act, 1965 (Revised in 1973):–

"5.(1) For the purposes of this Act, a corporation shall, subject to subsection (3), be deemed to be a subsidiary of another corporation, if –

(a) that other corporation –

(i) controls the composition of the board of directors of the first-mentioned corporation;

. . . . . ."

"6. Where a corporation –

(a) . . . . . .
(b) . . . . . .
(c) is a subsidiary of the holding company of another corporation,

that first-mentioned corporation and that other corporation shall for the purposes of this Act be deemed to be related to each other."

There was evidence in this case that five of the nine directors of TDMB were the nominees of NADEFINCO Holdings or NADEFINCO Limited, and there was also evidence that four of the seven directors of KJDB were nominated by NADEFINCO Holdings. If the learned president had considered that evidence in the light of the above-quoted provisions of the Companies Act, 1968, she would not have concluded that those two companies had no connection but would have found that they were related to each other within the meaning of section 6 of the said Act. As such, she should have considered those four transfers referred to in the charge as well as all similar transfers since the year 1973 between the various subsidiary or related companies of NADEFINCO Limited of which there was evidence galore in the ledger of TDMB exh (D. 48) which was produced before the court. She would have found that all those transfers or payments made even before the appellant was appointed a director in 1976 were made either with the knowledge of or on the directions of Tan, and should have drawn the inference favourable to the appellant and concluded that he could not have effected those four transfers in question without the approval or knowledge of Tan.

On the question of whether there was any dishonest intention, I can do no better than follow the Federal Court in *Navaratnam* v. *Public Prosecutor*[7] and quote here this passage from the judgment of Fazl Ali J. in *Harakrishna Mahatab* v. *Emperor*[8]:–

". . . . . I must point out that the essential thing to be proved in case of criminal breach of trust is whether the accused was actuated by dishonest intention or not. As the question of intention is not a matter of direct proof, the Courts have from time to time laid down certain broad tests which would generally afford useful guidance in deciding whether in a particular case the accused had or had no *mens rea* for the crime. So in cases of criminal breach of trust the failure to account for the money proved to have been received by the accused or giving a false account of its use is generally considered to be a strong circumstance against the accused."

In this case I think a simple question could have been asked and that was whether one would have any dishonest intention of committing criminal

breach of trust if the so-called withdrawals or transfers of funds were properly accounted for and recorded in the books of accounts of the companies concerned? If the learned president has asked herself that question and considered all the evidence, adduced both oral and documentary, in this case, she would have come to the conclusion that there was no dishonest intention on the part of the appellant to cause either wrongful loss to TDMB or wrongful gain to KJDB and should not have called for the defence.

(c) *The defence*

Although the defence should not have been called, yet having called the defence the learned president should have given due consideration to it and in particular to the evidence of the appellant (D.W.1). The president noted that the appellant in his defence had said that he was appointed executive director in-charge of financial affairs since April 1976 but was directly responsible to the managing director Tan who had been given very wide powers by the board in 1971 (exhibit P.13A) including the powers to transfer the funds of the company. However, he admitted that he was not given the authority to transfer funds by the board but maintained that he did so on the request of the managing director. The president held that the defence had not raised any reasonable doubts because, in her opinion, since the appellant knew that he had no power to transfer the funds, he should have reported the four payments to the board. She also considered that the fact that the appellant was following the past practice of making similar advances was no defence as the transfer of funds, even to associated companies, was "a matter of major importance" which should have been referred to the board because, as pointed out earlier, she considered that KJDB and TDMB had no direct connection. Finally, she concluded that by what she called "clever accounting system" that is, the device of the assignment of the debts to NADEFINCO Holdings, the four payments or transfers were concealed from the board of TDMB.

The learned president did not consider fully the evidence of the defence, especially that of Datuk Abdul Razak bin Yusoff (D.W.2), a chartered accountant and a partner of Razak & Company whose firm of certified public accountants had been auditing the accounts of TDMB, KJDB and NADEFINCO Holdings. Briefly that witness said that the four payments in question constituted loans from TDMB to KJDB at 1% interest per month; they had been properly accounted for in the books of the two companies which had been audited; it was normal for companies within the NADEFINCO Group to borrow from each other; those borrowings would be settled according to a procedure of assignment involving NADEFINCO Holdings; and that repayment of any nett balance due to TDMB would be paid by NADEFINCO Holdings. D.W.2 also told the court that he had consulted the managing director Tan about the four payments in question and had been assured by him that they were in order before the audit reports were finalised. In fact the 1% per month interest paid by KJDB on those four payments in question was higher than the rate of interest charged by commercial banks during the relevant period, which according to two other defence witnesses from the former Bank De L'Indochine and the United Asian Bank (D.W.3 & D.W.4) was 10.25% per annum. D.W.2 also confirmed that TDMB and KJDB were what accountants call "associated companies". Learned counsel for the appellant pointed out that D.W.2 was not shaken in cross-examination and that in the absence of any contradiction by any other expert witness, weight must therefore be given to the evidence of D.W.2. In any case the confirmation to D.W.2 by Tan that the four payments were in order should have raised a reasonable doubt which together with evidence of past practice in the companies of the group must negative dishonest intention on the part of the appellant. Counsel also pointed out that there was no suggestion made to D.W.2 during his cross-examination about those payments being concealed from the board of TDMB through what the president had concluded to be a "clever accounting system". In fact the form of settlement adopted and the reason for adopting it were explained to the court and there was nothing sinister in it. In short, it was the submission of counsel for the appellant that the president in considering the evidence of the defence had misdirected herself. The learned deputy conceded that the president had not given sufficient reasons for concluding that the defence had not raised a reasonable doubt in the truth of the prosecution's case but contended that she had not on the whole misdirected herself and that even if there were misdirections the appellate court should not disturb her findings of fact.

(d) *Decision on appeal*

I allowed the appeal and set aside the conviction and sentence after studying the appeal records as well as hearing both counsel for the appellant and the learned deputy. I was satisfied that the president's approach to the determination of issues involved was wrong. In the first place, she should have come to the conclusion that there was no *prima facie* case and should not have called for the defence. But having called for the defence, she should have given sufficient consideration to the evidence given by the appellant and his witnesses. I was not unmindful that whilst an appellate court could only read the appeal records without hearing the evidence and seeing the witnesses, but in this case having perused the appeal records and having heard and considered the submissions of counsel for the appellant and the respondent, I was satisfied that not only there was no *prima facie* case proved against the appellant but also that the evidence adduced by the defence had created a reasonable doubt whether or not the appellant had committed the offence of criminal breach of trust by an agent as alleged by the prosecution. Therefore, without disregarding the judgment appealed from and having given due consideration and due weight to the findings of fact of the lower court, I considered that the conviction should be set aside not only because it was against the weight of the evidence but also because the learned president had failed to consider all the evidence that was before her and in that sense had also failed to consider fully the defence evidence. (See *Mohamed Shariff* v. *Public Prosecutor*[9]).

Conviction set aside.

Solicitors: *Rithauddeen & Aziz.*

SECURICOR (M) SDN. BHD. v. UNIVERSAL CARS SDN. BHD.

[O.C.J. (George J.) April 25 & May 8, 1984]

[Kuala Lumpur – Companies (Winding Up) No. 58 of 1982]

Company Law – Winding-up of company – Conditions for – Companies Act 1965, s.218(1)(e) & 218(2)(a).

It is not the neglect to meet the demand of the creditor that gives the jurisdiction to the court to order that the company be wound up but the inability of the company to pay its debts. It is the presumption arising from the neglect to meet the demand that gives the court the jurisdiction. This presumption is rebuttable.

Case referred to:

(1) *In re London and Paris Banking Corporation* (1874) L.R. 19 Eq. Cases 444.

PETITION.

K.H. Koh for the petitioner.
K. Anantham for the respondent.

Cur. Adv. Vult.

George J: On April 27, 1984 I dismissed the petition by Securicor (M) Sdn. Bhd. to wind up Universal Cars Sdn. Bhd.

By section 218(1)(e) of the Companies Act the Court may order the winding up of a company if it is unable to pay its debts. By section 218(2)(a) the company shall be deemed unable to pay its debts if a creditor to whom the company is indebted in a sum exceeding $500.00 then due has made a demand for the same and the company has for 3 weeks thereafter neglected to pay the same. It is to be noted that it is not the neglect to meet the demand of the creditor that gives the jurisdiction to the Court to order that the company be wound up but the inability of the company to pay its debts. It is the presumption arising from the neglect to meet the demand that gives the Court the jurisdiction. This presumption is rebuttable.

In the instant case it seemed to me that the position was on all fours with the position that obtained *In Re London and Paris Banking Corporation*[1]. In that case Sir G. Jessel M.R. said at 446

". . It is very obvious, on reading that enactment, that the word "neglected" is not necessarily equivalent to the word "omitted". Negligence is a term which is well known to the law. Negligence in paying a debt on demand, as I understand it, is omitting to pay without reasonable excuse. Mere omission by itself does not amount to negligence. Therefore I should hold, upon the words of the statute, that where a debt is *bona fide* disputed by the debtor, and the debtor alleges, for example, that the demand for goods sold and delivered is excessive, and says that he, the debtor, is willing to pay such sum as he is either advised by competent valuers to pay, or as he himself considers a fair sum for the goods, then in that case he has not neglected to pay, and is not within the wording of the statute."

In the instant case the company did not neglect the statutory demand of June 5, 1982. By its letter dated June 22, 1982 in reply to the